

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

74-2145

To be argued by
HENRY ROTHBLATT

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

DOMINICK ROMANO,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT COURT

DOMINICK ROMANO,
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-against

UNITED STATES OF AMERICA,
Respondent-Appellee.

PETITIONER-APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from an Order of the Hon. Lloyd F. MacMahon, Judge of the District Court for the Southern District of New York, denying Appellant's petition under 28 USC 2255, seeking to vacate a conviction and sentence of twenty years (20). Appellant is presently incarcerated in the United States Penitentiary in Atlanta Georgia.

Dominick Romano was convicted on March 14, 1969, after a jury trial in the United States District Court for the Southern District of New York, of conspiracy to import narcotics in violation of sections 173 and 174 of Title 21, United States Code. On April 15, 1969, Hon. Lloyd F. MacMahon sentenced Dominick Romano to the maximum penalty--20 years imprisonment and a five thousand dollar (\$5000) fine.

QUESTIONS PRESENTED

1. WAS IT ERROR TO DENY APPELLANT'S PETITION
AS A SUCCESSIVE PETITION WHEN THERE HAS
BEEN NO DECISION ON THE MERITS OF HIS CLAIM?
2. CAN AN ALLEGATION THAT PERJURED TESTIMONY
WAS INSTRUMENTAL IN SECURING APPELLANT'S
CONVICTION BE CONCLUSIVELY RESOLVED BY
THE FILES AND RECORDS OF THIS CASE?
3. MUST THE PETITIONER'S SENTENCE AND JUDG-
MENT OF CONVICTION BE VACATED BECAUSE IT
WAS OBTAINED THROUGH THE KNOWING USE OF
PERJURED TESTIMONY?

STATEMENT OF FACTS

The trial, judgment of which is now sought to be vacated was the only trial of the Appellant. However, it was the second of two separate trials held on a single indictment handed down in 1964. That lone indictment charged 28 persons with a multi-level conspiracy to import narcotics in violation of sections 173 and 174 of Title 21, United States Code. Twelve of those persons were named as defendants, 16 as co-conspirators, (A-38-43) *

The first jury trial was held in 1965 before Judge Bonsal for six of the major defendants. In that trial Joseph Armone, Stephen Grammuta, Vincent Pacelli, and Nicholas Viscandi were convicted, while Alfred Armone and Alexander Schoenfeld were acquitted.

The government had charged in the indictment that the conspiracy continued in existence from 1956 to 1964. It allegedly consisted of three subgroups:

*A-refers to pages of appendix.

the exporters, the receiving agents, and the wholesalers.

THE EXPORTERS

There were allegedly three separate sets of European exporters, each of whom had their own courier or couriers. The first was the Aranci brothers of Marseilles. Their courier was Clarence Aspelund, a ship's baker employed by the American Export Lines. The second exporter was Felix Barnier of Paris. His couriers were Charles Bourbonnais, a flight purser for Trans-World Airlines, and Maurice Rosal, a Guatamalan ambassador. The third exporter was unnamed. The couriers for this individual were Georges (a/k/a Pierre) Roulet and Georges Henripierre, both employees of Air France.

The Receiving Agents and Wholesalers

The government alleged that the original deliveries were made to Joseph Cahill. Sometime before September, 1959, Cahill ceased receiving narcotics. Subsequent deliveries of narcotics were made to Nicholas Calamaris. The import group allegedly included Joseph Armone, Stephen Grammuta and Arnold Romano, the Petitioner's brother now deceased. The Petitioner himself, Dominick Romano, was not alleged to be a full-fledged member of the import group. Along with one Frank Sherbicki, he was merely alleged to have "performed services" for

the import group.

Wholesale Distributors

The wholesale group allegedly consisted of Vincent Pacelli and Michael Ricucci. Carmine Guanti received narcotics on behalf of the wholesalers from the importers.

The Overt Activities

The Government alleged that in 1956, Clarence Aspelund, the courier of the Aranci brothers, met Joseph Cahill in New York, and it was agreed that Aspelund would begin deliveries to Cahill. Aspelund began to bring the heroin to his home, where Cahill would pick it up. (A-44-45)

Both the Petitioner and his brother were placed in contact with the alleged conspiracy by the testimony of Charles Hedges. Sometime in 1958 Cahill met Charles Hedges, and both men took rooms in the Vanderbilt Hotel. Cahill then directed Hedges to meet Aspelund in the street and bring him to the hotel room. Cahill offered Aspelund a sum of money which was said to be insufficient. Cahill then allegedly directed Hedges

to get money from Arnold Romano, the brother of the Petitioner, who was supposed to be waiting in the street. When Hedges brought back some additional cash, Aspelund gave Hedges a set of car keys. Later, Hedges went to Aspelund's car, removed the package therein and delivered it to Carmine Guanti on 42nd Street in New York City. (A-46-48)

In each of several subsequent deliveries by Aspelund, Cahill and Arnold Romano, the Petitioner's brother allegedly drove to Aspelund's house in Derby, Connecticut. On these trips, Hedges followed them in a car supplied by the wholesalers Pacelli and Ricucci. On each occasion, a package was placed in Hedges' car which he later dropped off at a garage at East 116th Street and Pleasant Avenue in Manhattan. (A-49-54)

At the Petitioner's trial Aspelund claimed that these deliveries continued up to Christmas, 1959. (A-55-56). This testimony conflicted directly with Aspelund's testimony at the prior trial that he had no contact with Cahill or Hedges after September, 1959. (A-111-116)

Deliveries from Roulet

The Government alleged that, in June 1958, Hedges and Cahill met Georges Roulet at Rockefeller Center, where Roulet gave Cahill a package. Three weeks

later, Arnold Romano, the brother of the Petitioner allegedly drove Cahill and Hedges to the Gramercy Park Hotel. Cahill and Hedges spent the night at the hotel. Roulet visited them, and Cahill told Hedges he would be working with Roulet from that time on. As the meeting concluded, Roulet gave Hedges two packages, which were supposedly taken to Hedges' home. Hedges testified that he subsequently met Roulet ten, twelve or thirteen times in various New York hotels and that, upon each occasion, Roulet gave him two packages in exchange for \$9,000 cash. (A-57-62)

After each transaction, Hedges took the packages either to his home or to Cahill's home. At one such meeting between Roulet and Hedges at the Commodore Hotel, Roulet introduced the courier Henripierre. Hedges met Henripierre six or seven times subsequent to that meeting at the Commodore. (A-63-64)

Then, sometime in 1958, Hedges allegedly drove Arnold Romano, Petitioner's brother, and Cahill to Grand Central Station. While Hedges waited in the car, Arnold Romano and Cahill went into the station and brought out two (2) suitcases. Later that night, Hedges and Cahill put the suitcases in an unidentified car. (A-65-66)

Hedges also testified that upon two occasions, he aided Arnold Romano in delivering packages. On

the first occasion in September or November, 1958, Arnold Romano gave Hedges some car keys and told him to meet him at 19th Street and Frist Avenue. Hedges met Arnold Romano there, and Carmine Guanti came over to the car and removed a package. The car belonged to Pacelli or Ricucci, the wholesalers. On the second occasion, Hedges and Arnold Romano picked up a package at a bar. (Apparently, Arnold Romano had supposedly left the package earlier.) They then delivered it to Tootie Schoenfeld, who paid Arnold Romano \$4,000. (A-67)

Sometime in December, 1958, Hedges was again staying at the Commodore Hotel, awaiting a delivery from Henripierre. Hedges testified that Dominick Romano, the Petitioner, came to the room where Hedges allegedly told him, "You are in a trap here! This guy could be followed and you are just trapped. You can't get out of it." Petitioner allegedly left but later returned. Hedges then told him, "Get the hell out of here! The guy didn't come. They will think we are running a bookmaking ring here, the house detective or something." It was Hedges' testimony that Dominick Romano replied "that he was going to take this over, you know, he was going to meet these guys in the hotel from now on, you know." (A-68-69)

Hedges further testified that sometime in 1959, he and Joe Cahill went up to East Harlem, because Pacelli and Ricucci wanted to see Cahill. Hedges

testified that Pacelli and Ricucci had related to him: "Dom, he comes up with a broad sitting in the car, and he hands me a package right on the middle of Pleasant Avenue and 117th Street or 116th Street." (A-70)

Deliveries from Charles Bourbonnais

Back in July or August, 1957, Bourbonnais had arranged to meet Cahill in the Plaza Hotel. After identifying themselves, Bourbonnais allegedly arranged to and did on several occasions deliver packages to Cahill at the Miracle Mile Shopping Center in Manhasset, Long Island. At some of those meetings, Arnold Romano, Petitioner's brother, was present. Bourbonnais testified that they also had used a meeting place in Queens and met altogether 20, 25 or 30 times over a period of a year to a year and a half. He testified that the last delivery was made to Cahill no later than the early part of 1959. (A-71-77)

Bourbonnais testified that he met Hedges around the early part of 1959, at about the same time that he stopped seeing Cahill. Bourbonnais had arranged to meet Cahill on 55th Street and First Avenue, but Hedges appeared, instead, telling Bourbonnais, "I am coming in place of Joe." Hedges got into the car and gave Bourbonnais a small sum of money. Then, Hedges met Bourbonnais two or three weeks later at LaGuardia

Field in the airlines parking lot. According to his testimony at the Petitioner's trial, Bourbonnais gave Hedges two (2) large suitcases and Hedges gave Bourbonnais \$100,000. (A-78-81)

At the trial, Bourbonnais expressly stated that he had been given three (3) suitcases by Gilbert Coscia, a named co-conspirator. Bourbonnais testified that he gave one of these three suitcases to Cahill and the remaining two to Hedges at their respective meetings. (A-82-83) However, at the Armone trial Bourbonnais testified that, of the three suitcases he received from Gilbert Coscia, "Two suitcases I gave to Cahill and one of them I took packages out that were wrapped up in three or four kilo packages and upon instructions from Mr. Barnier, according to the amount he would receive in exchange, he would say, 'Give me so many packages, so many kilos.'"

Q. "This is Cahill."

A. "Yes, sir, this is Cahill." (A-103)

Bourbonnais further testified that he had previously told narcotics agents that he gave all three suitcases from that first delivery from Coscia to Cahill in bulk. (A-104)

Bourbonnais also testified that at one time, although he could not remember when, he had testified that he took all three suitcases home and doled them out piecemeal to Cahill.

Bourbonnais later admitted that he had previously told the prosecutors, in answer to their questions, that

he gave one suitcase in bulk to Cahill. The other two he doled out periodically on instructions from Barnier. (A-105,6) It should be noted that at the trial of Joseph Cahill and Charles Hedges, Mr. Bourbonnais was totally unable to give any evidence whatsoever against Hedges. (U.S. v. Cianchetti, D.C. Conn. 1961, Crim. # 10,250).

On October 2, 1960, Bourbonnais, Calamaris and Tarditti met at Rockefeller Center to await Rosal, who had become a courier. Rosal did not arrive. (A-84-86)

On October 3, 1960, Bourbonnais, Calamaris and Tarditti met Rosal at 72nd Street and Lexington Avenue. They were arrested by federal agents, who found 52 kilos of narcotics in the trunk of Rosal's taxi. Rosal had \$26,500 in cash on his person, while Calamaris' car contained \$43,995. Bourbonnais was found to have a notebook containing notations of deliveries to Calamaris and monies received. (A-86-90)

The Prosecutions

Charles Hedges and Joseph Cahill were prosecuted in Connecticut in 1961. Cahill fled after the beginning of trial and was tried in absentia. Charles Bourbonnais testified at the trial but was unable to give evidence against Hedges. Hedges and Cahill were convicted, and Hedges received a sentence of 15 years in prison. The convictions were affirmed by the Court of Appeals for the Second Circuit in United States v. Cianchetti, 315 F. 2d 584 (1961).

Narcotics agent Thomas Dugan, who was in charge of the investigation of the case of Charles Bourbonnais and was present at the arrest and trial of Charles Hedges, visited Hedges in prison and questioned him. Subsequently, Hedges' appeal bond was lowered and Hedges was released. Dugan and Hedges met many times while Hedges was free. His conviction was affirmed and Hedges was reincarcerated. However, his attorney made an application for reduction of sentence and the trial judge, Judge Timbers of the United States District Court for Connecticut, reduced the sentence to five years.

Early in 1962, Charles Bourbonnais was transferred from Danbury Federal Penitentiary to California, but he was brought back to testify at the Sachs-Mazza trial.

At this time he was brought to the office of Assistant United States Attorney James Tendy. Bourbonnais was asked to identify Charles Hedges in a face-to-face confrontation but was unable to do so. Finally, Hedges told him who he was and related a story of their supposed meeting. (A-107-110)

One month after the Grand Jury handed down an indictment in the present case, Bourbonnais' sentence was commuted by the President.

The Indictment and Trial of Dominick Romano

The indictment obtained in 1964 charged 28 individuals with conspiracy to import narcotics in violation of §§173 and 174 of Title 21, United States Code. Twelve persons were named as defendants, 16 as co-conspirators. As outlined above, six of the major defendants were tried in 1965 before Judge Bonsal.

Dominick Romano, the Petitioner, was not arrested until 1968. At that time, the Petitioner was 50 years old, an honorably discharged veteran of World War II, and had never previously been arrested. He was brought to trial on March 3, 1969 with his brother, Arnold Romano, Carmine Guanti, and Frank Sherbicki. Trial was held before Hon. Lloyd F. MacMahon in the Southern District of New York. Trial continued until March 13, 1969.

Contrary to assertion of Daniel Beller, Assistant United States Attorney in his answer to the present petition, Dominick Romano was never a fugitive. That assertion is utterly without foundation.

Jury Deliberations

The jury commenced deliberations at 12:37 P.M. on March 13, 1969. At 4:00 P.M., the jury returned and requested that it be recharged as to the three elements of conspiracy which Judge MacMahon had previously given them. The jury resumed deliberations at

4:05 P.M. (A-91,92)

The jury returned at 6:35 P.M. and requested a copy of overt acts 10 and 11, as they appear in the indictment, and two parts of Charles Hedges' testimony. Specifically, the jurors wanted to hear Hedges' testimony regarding 1) Carmine Guanti's receipt of packages and dates thereof, and 2) Dominick Romano's delivering the packages when in a car with girl and date thereof. The jury resumed deliberation at 6:50 P.M. (A-93,94)

At 9:00 P.M. on March 13, the prosecution made application for a clarifying instruction to be given to the jury with respect to the overt act requirement. Mr. Leisure, for the Government, sought to have the jury charged that the overt act requirement was satisfied if "some overt act was performed by an coconspirator or any member of the conspiracy within the period of limitations" and, further, that the overt act committed need not be one charged in the indictment. The court refused to give this clarifying instruction, stating that he would not give the jury the little push prosecution obviously wanted. (A-94-96)

At 9:40 the jury was sequestered for the night. Deliberations resumed the following day. At 12:20 P.M. March 14, the jury was brought back to court. The jurors requested to have read Mr. LaRossa's (Petitioner's counsel) summation. The court refused

the request. At this time, Judge MacMahon gave the jury a clarifying instruction as to overt acts. The jury was instructed that, once the Government proved that the defendants knowingly joined in a conspiracy. "it is not necessary for the Government to prove that a defendant himself did anything or that he ever committed an overt act...(the Defendant)...is bound by it, if it was done by a coconspirator, any other member of the conspiracy in furtherance of the objectives."

"The two overt acts here, you will see if those were done by any member of the conspiracy, not whether they were done by any of these defendants on trial. That isn't the question. "

"Has the Government proved beyond a reasonable doubt that they were done by any member of the conspiracy?" (A-97-101)

The jury resumed deliberations at 12:25 P.M.. The jury returned at 12:30 P.M. with a verdict of guilty as to all four defendants. (A- 102)

On April 15, 1969, Judge MacMahon sentenced Dominick Romano to 20 years in prison, the maximum penalty and a \$5,000 fine. Appeal was taken to the Court of Appeals for the Second Circuit, and the convictions were affirmed in United States v. Guanti, 421 F.2d 792. A petition for certiorari was denied by the Supreme

Court on October 12,1970.

The Previous Petition

On June 18,1971, Appellant filed a pro se petition, to vacate sentence pursuant to § 2255 Title 28, United States Code. Among other grounds urged for vacating his sentence the Appellant alleged that perjury had been committed by several witnesses who testified at his trial.

No hearing was held and on January 5,1972 Hon. Lloyd F. MacMahon denied the petition in all respects. Concerning the Appellant's claim that perjury had been committed at his trial the Court wrote:

Such unsupported conclusory allegations and speculations do not raise issues which would require an evidentiary hearing nor the ultimate relief petitioner seeks. (A-22)

The Court further wrote:

Additionally, petitioner's allegation that the testimony of Hedges and Bourbonnais was perjurious because of government promises is without merit, as petitioner has failed to demonstrate any perjurious testimony. (A-24)

The entire decision denying appellant's initial petition is annexed hereto. (A-16-34)

An Appeal was taken to this Court from the decision of Judge MacMahon. That Decision was affirmed by this Court, Romano v. United States , 460 F.2d 1198 (2d Cir.) Cert denied, 409 U.S. 915 (1972).

The per curian opinion of this Court stated,
with regard to the allegation of perjury:

This claim is without merit. No evidence of perjury is noted and no false testimony is cited. (A-36)

This Court concluded that the allegations of the petitioner were not sufficient to "entitle a petitioner to a hearing."

The entire opinion of this Court on the previous appeal is appended hereto. (A-35-37)

The current petition was filed on February 22, 1974. Again, the appellant asserted that perjury was committed by several witnesses who testified to his trial.

On July 25, 1974, this petition was dismissed by Hon. Lloyd F. MacMahon, without a hearing. The Court dismissed the petition as a "successive petition within the meaning of 28 U.S.C. §2255. Sanders v. United States, 373 U.S. 1, 9 (1963)." The Court also stated:

Moreover it clearly appears from the files and records in this case, which are accurately summarized in the opposing affidavit of Daniel J. Beller, Assistant United States Attorney...that petitioner's present claims are frivolous and without merit and that he is entitled to no relief.

POINT I

IT WAS ERROR TO DENY APPELLANT'S
PETITION AS A SUCCESSIVE PETITION
WHEN THERE HAS BEEN NO DECISION ON
THE MERITS OF HIS CLAIM.

It is patently clear that this petition could not be properly dismissed as a successive petition. In Sanders v. United States 373 U.S. 1, 10 L Ed. 2d 148 S.Ct. 1068 (1963) the Supreme Court set forth definitive rules establishing the procedure to be followed by District Courts in handling petitions brought pursuant to 28 U.S.C. 2255.

In specific reference to that section of the statute which permitted the District Court to summarily dismiss a "successive petition" the Supreme Court wrote:

Controlling weight may be given to denial of a prior application for federal habeas corpus or §2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.
373 U.S. at, 15, 10 L Ed. 2 at 161.

It is plain from reading the decisions of the District Court, and this Court, that, as to appellant's claims of perjury, the prior petition was not denied on the merits. Neither the lower Court nor this Court believed

the appellant's prior application set forth sufficient facts in support of its conclusions that perjury had been committed at appellant's trial. The allegations were held insufficient to require a hearing.

This determination obviously does not satisfy the Supreme Court's vision of a resolution which would foreclose further litigation of a ground raised by a §2255 petitioner. The question of whether perjury was actually committed at appellant's trial was not resolved by the trial court. Absent such a determination on the first petition, a second petition cannot be denied as successive. Sanders v. U.S., supra, 373 U.S. at 16, 10 L Ed. 2d at 162, Stephens v. United States 246 F 2d 607, (10th C.A., 1957).

This Court was not under the illusion that a determination on the merits had been made on appeal from the previous denial. This Court held that appellant's allegations did not present a "sufficient basis for vacating a judgment of conviction" nor were they sufficient to "entitle petitioner to a hearing on the alleged use of perjurious testimony."

A denial of Section 2255 petition because of the insufficiency of the pleadings is not an adjudication on the merits. A denial on the merits "means that if factual issues raised in the prior applications, and it was not denied on the basis that the files and records

conclusively resolved these issues, an evidentiary hearing was held." Sanders v. U.S. at 16, 10 L Ed.2d at 162.

No hearing was held on the prior application. The ruling of the Court that the allegations were insufficient was "merely a ruling that petitioner's pleading was deficient". Sanders v. U.S., supra, 373 U.S. at 19, 83 S.Ct. at 1079.

This determination does not satisfy the requirements of Sanders, and so cannot serve as a predicate for the denial of a subsequent petition as "successive". Sanders v. U.S., supra; Villarreal v. United States, 461 F.2d 765, 767 (9th C.A., 1972); Gomez v. United States 396 F.2d 323, 325 (C.A. 1968).

POINT II

AN ALLEGATION THAT PERJURED TESTIMONY WAS INSTRUMENTAL IN SECURING APPELLANT'S CONVICTION COULD NOT BE CONCLUSIVELY RESOLVED BY THE FILES AND RECORDS OF THIS CASE.

In its decision on Appellant's present petition the District Court held that the records and files of the case demonstrated "clearly" that appellant's claim was without merit. Such a decision is completely at odds with undisputed controlling law.

The appellant alleged in his petition that his conviction was secured by means of perjured testimony by several prosecution witnesses. Without benefit of a hearing at which appellant could present evidence of such perjury, the lower court concluded that such actions did not occur. The decision is remarkable and cannot be sustained.

An allegation that the prosecution knowingly used perjured testimony and that the testimony had a vital effect on the verdict is a sufficient ground to entitle the Petitioner to a hearing upon the charges. United States v. Derosier 229 F. 2d 599 (3rd C.A.1956); Smith v. United States 259 F.2d 125 (9th C.a.,1958).

A hearing is mandated because proof of perjury is rarely contained in the record of a trial. If it were, only the incompetant administration of justice would allow it to slip by.

The facts upon which appellant's claim rests are not part of the record. Appellant specifically informed the lower court in his Memorandum of Law that he intended to subpoena certain corporate and government records for presentation at a hearing. The Court was further informed that, based upon information already gleaned, the appellant believed these records would provide additional proof of the allegations contained in the petition.

The lower court was also supplied with the transcript of part of the testimony given by one of the alleged perjurers, Clarence Aspelund at prior trial involving the same conspiracy (U.S.v. Cianchetti, U.S.D.C.Conn.1964 Crim.# 10,250).

Aspelund's prior testimony was unmistakably different from that version he dutifully delivered at appellant's trial. The differences were material and significant, yet no hearing was ordered.

The appellant has never had a hearing on the merits of his claim for relief. The merits of his claim cannot be decided without such a hearing. Since the facts upon which petitioner's claim of perjury is predicated are outside the record, it is impossible for an examination of the records and files to conclusively resolved his assertions.

With all due respect to Judge MacMahon only a human lie detector could decide "conclusively" that testimony

was truthful merely by listening to it. Despite the historic protection against perjury allegedly offered by cross-examination, perjury is unfortunately rife in our judicial system.

The scourge of perjury knows no limits, It is apparently practiced by virtually every type of witness. Indeed, police perjury is well-known and widespread. So much so that in recent communication Richard Kuh, District Attorney for the County of New York, advised his assistants that they were under no special duty to protect such illegal police conduct and were, rather, obligated to scrutinize questionable police conduct with a view toward purging such behavior from our system.

Evidence of perjury appears not from the testimony itself, although it may, but from the comparison of testimony with extrinsic evidence. Testimony must be checked against known facts and where as here, those facts are not part of the record, a hearing must be held. Andrews v. United States 286 F. 2d 829,831 (5th Cir.1961). That hearing has yet to be held in this case.

In this sense this case is not unlike Sanders v. United States. The petitioner in Sanders alleged that his guilty plea had been taken while he was under the influence of drugs administered by jail authorities. The lower court ruled that the files and records of the case "conclusively

show (ed)" that the petitioner's claims were without merit.

The Supreme Court stated quite forthrightly that the files and records of the case could not possibly show whether petitioner was under the influence of narcotics at the time of his plea and thus, legally unable to intelligently waive his constitutional rights. Likewise, here, the files and records of the Romano trial could not possibly show conclusively that perjury was not committed by witnesses called by the government.

The petitioner claims here that testimony of certain witnesses was perjured, and that it resulted in petitioner's conviction.

The proof of perjury is not alone in the files and records of this case, but in extrinsic evidence which plainly contradict the testimony which appears on the record. To rely on the "files and records" to deny this petition is to allow the perjury to again work its mischief.

POINT III

THE PETITIONER'S SENTENCE AND JUDGMENT
OF CONVICTION MUST BE VACATED BECAUSE
IT WAS OBTAINED THROUGH THE KNOWING
USE OF PERJURED TESTIMONY.

The Petitioner's motion to vacate sentence alleges that perjury was committed by three witnesses who testified on behalf of the prosecution at Petitioner's trial. The petition also alleges that Government officers, specifically the Assistant United States Attorney prosecuting the case, and a federal narcotics agent were aware of the perjury and made no effort to correct this testimony. The petition further alleges that these Government officers deliberately withheld documentary evidence which would have contradicted the perjured testimony given at trial.

The knowing use of perjured testimony by a prosecutor or the deliberate suppression of evidence constitutes a denial of due process of law and warrants the granting of a new trial. Mooney v. Holohan, 294 U.S.103, 55 S.Ct. 340, 79 L Ed. 791 (1935); Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed.214 (1942).

Clarence Aspelund testified at the Petitioner's trial. Aspelund was a ship's cook and admitted courier of narcotics. At the Petitioner's trial Aspelund testified that he continued to deliver narcotics to Joseph Cahill and Charles Hedges until "close to the end of 1959" and "close to Christmas".

At a prior trial involving the identical conspiracy

(United States v. Cianchetti, U.S.D.C. Conn., 1964, Crim. #10, 250), Aspelund gave a significantly different version of his last delivery. At the Cianchetti trial Aspelund testified that he made his last delivery to Cahill and Hedges in September, 1959. His ship arrived in New York on September 9, 1959. He telephoned Joseph Cahill and informed him that he had a shipment. A meeting was arranged and subsequently Charles Hedges picked narcotics up at Aspelund's house in Connecticut. Hedges payment was \$10,000 short. At a later meeting in New York City Hedges refused to make payment, claiming the drugs were of inferior quality. After that meeting Aspelund was unable to locate Cahill or Hedges again. He tried the various bars they frequented and called the telephone number Cahill had given him, OR-4-4197. The number was disconnected.

Aspelund's statement that the telephone number was inoperative was confirmed by the testimony of a representative of the telephone company. Mr. Fleming testified that at the request of the party to whom the number was assigned OR-4-4197 was changed on September 22, 1959.

Aspelund's perjury is significant and material. All of appellant's alleged activities were related to the activities of Joseph Cahill. The appellant has tirelessly contended that all of Cahill's activities ended prior to September 30, 1959, the date on which the bar of the statute of limitations fell in the activities of this case.

This Court rejected this defense on the direct appeal of appellant's conviction. At that time, the Court concluded

that, "From the evidence adduced, the jury could properly conclude that the (The Romanos) had not withdrawn from the conspiracy on or before the date of the statutory bar." Obviously, Aspelund's testimony that he continued deliveries to Cahill through the end of 1959 was evidence that withdrawel had not occurred prior to September 30, 1959.

The government's answer suggests that Aspelund's testimony at the Romano trial was "substantially the same testimony" that he gave at the earlier (Cianchetti) trial. The Government's answer further suggests taht any discrepancy was somehow due to the delay between the transaction and the trial caused by the appellant's flight.

Both assertions are baseless and absurd. Dominick Romano was not a fugitive and it is extremely disingenuous of the government to assert that he was. As for the testimony itself, the government met with the witnesses and was able to prepare them for their testimony. The earlier transcript as well as the government's entire file was available to the prosecutors to aid in its preparation. It is childish to suggest that Aspelund was relying on his memory and made an innocent error.

The prosecutor's burden to correct perjured testimony cannot be as easily discharged as the government would propose. In *Levin v. Katzenback*, 363 F.2d 287 (D.C. Cir., 1966), the Court held that the duty of the prosecutor to disclose favorable evidence may not depend on whether more able or diligent counsel might possibly have come upon the

evidence himself. 363 F 2d at 291.

While it is true that Clarence Aspelund's prior testimony was a matter of public record, the prosecutors in this case were fully aware that appellant's counsel was not familiar with the prior testimony. The record of Appellant's trial clearly reflects that there was but the copy of the transcript of the Cianchetti trial available to all counsel and that the district court refused to allow that transcript to leave the courtroom.

The government was required to prove that at least one of the overt acts charged in the indictment occurred after September 30, 1959, the Statute of Limitations cut off date. It is true that Aspelund's testimony related to neither of the two overt acts which allegedly occurred after September 30, 1959. But, before the jury could reach the question of whether a post-September overt act had been committed, they had to determine that there was one conspiracy, that the appellant had not withdrawn therefrom, and that he was chargeable with the overt acts admittedly not committed by appellant. Aspelund's testimony was relevant to each of these three questions.

At no time did the prosecution, through Assistant United States Attorney Michael Leisure or Agent Thomas Dugan of the Bureau of Narcotics and Dangerous Drugs, bring Aspelund's highly prejudicial and material misstatement of facts to the attention of the defense, the court, or the jury.

The representatives of the Government have an affirmative responsibility to correct false testimony and elicit the truth. Napue v. Illinois, 360 U.S. 264 at 270; 3 L.Ed. 2d 1217 at 1221; 79 S.Ct. 1173 (1958); see also People v. Savvides, 1 N.Y. 2d 554, 154 N.Y.S. 2d 885 (1956).

The prosecution must make available all material and relevant evidence which may be helpful to the defendant. United States v. Zhorowski, 271 F.2d 661 (2d Cir., 1959).

"The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which the defendant is tried. In the long run it is more important that the government disclose the truth so that justice may be done than that some advantage might accrue to the prosecution toward assuring a conviction."

271 F.2d at 668 citing Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

The requirement that the Government prove its case beyond a reasonable doubt means that the Government, by failure to disclose evidence, should not prevent the defendant from producing evidence which might create a reasonable doubt. (271 F.2d at 668). The failure to disclose Aspelund's perjury in itself, deprived the defense of an opportunity to create a reasonable doubt in the minds of the jurors.

The fabricated element of Aspelund's testimony dealt directly with an issue upon which the jury had to decide--

whether the prosecution of the defendant was barred by the Statute of Limitations. The failure of the prosecution to correct Aspelund's testimony was an invasion of the jury's province as the sole finders of fact and denied the Petitioner due process of law.

The jurors were entitled to know the nature of Aspelund's testimony so that they could properly assess Aspelund's credibility and competence to testify.

Had the jury been aware of Aspelund's perjury it might well have concluded that all his testimony was fabricated. See Napue v. Illinois, 360 U.S. at 270, 3 L.Ed. 2d at 1221 (1959).

The failure of the prosecutor to correct the perjured testimony of its witness denied the Petitioner due process of law.

CONCLUSION

The decision of the District Court should be reversed and the cause remanded for a hearing on the merits of the appellant's claim.

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Respectfully submitted,

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On The Brief

Received ² copies of the within
Appellant's Brief
this 18 day of Nov, 1974.

Sign _____

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